2001

State of Utah v. William Stewart : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH Plaintiff-Respondent vs. WILLIAM STEWART Defendant-Appellant	:	Case No. 13772

BRIEF OF APPELLANT

Appeal from a jury trial verdict and judgement rendered against the defendant-appellant in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Joseph G. Jeppson, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH Plaintiff-Respondent vs. WILLIAM STEWART Defendant-Appellant	:	Case No. 13772

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, WILLIAM STEWART, appeals from a judgement and sentence entered against him in the Third Judicial District Court in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

On June 19 and 20, 1974 the Defendant-Appellant was tried to a jury before the Honorable Joseph G. Jeppson and found guilty of the offense of Unlawful Distribution of a Controlled Substance for Value.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a remand to the Third District Court for a new trial.

STATEMENT OF FACTS

On June 19 and 20, 1974 the appellant Mr. William Stewart was tried to a jury for the offense of Unlawful Distribution for Value of the Controlled Sustance, Marijuana to the State's chief witness Rodney Ward.

The state's chief witness, Rodney Ward, testified that on the 10th day of November 1973 he went to the police station (R-11) contacted Officer Brophy of the Salt Lake Police Department (R-11) was "Strip Searched" (R-12) and then given $20 by the officer (R-14). Mr. Ward stated that he was taken to the neighborhood of 836 Licoln Street by Officer Brophy (R-14) where he purchased marijuana from the defendant (R-18). Mr. Ward testified that he was then taken back to the police station where he gave the lids to Officer Brophy (R-20) and was searched by the officer (R-20).

Mr. Ward testified that while he was inside 836 Lincoln he was wearing a listening device. (R-13).

During cross examination by appellants counsel the court sustained an objection, by the prosecution, to a question put to Mr. Ward concerning a juvenile court finding that he had burglarized a Salt Lake City Home (R-34).

Officer Brophy testified that prior to sending Mr. Ward to 836 Lincoln he had attached a monitoring device to his body (R-81). Officer Brophy testified further that he had taped the button open so that the monitoring device could not be shut off. Officer Brophy stated that he and Officer Millard had remained in their vehicle and recorded the conversation

between Mr. Ward and the appellant (R-81, 82).

Officer Brophy then testified that he had subsequently erased the conversation on the tape (R-82).

Defense counsel moved the Court to order the prosecution to produce the tape recordings of the actual conversation between the appellant and the State's Chief witness or in the alternative dismiss the case against the appellant (R-88). The motion was denied (R-88).

Mr. Lynn Kenison testified that he is a chemist for the Salt Lake County Health Department (R-114), that he had analyzed the substance which Mr. Ward had given the police (R-115) and found it to be marijuana (R-115).

The defendant-appellant testified that he had never sold marijuana to Mr. Ward (R-139).

The jury found the defendant-appellant guilty of selling marijuana (T-33). On July 19, 1974 the court sentenced the defendant to the Utah State Prison for undetermined time as provided for by law and ordered him for committed. (T-37).

A R G U M E N T

POINT I

WHERE THE APPELLANT'S COUNSEL WAS NOT ALLOWED TO QUESTION THE STATE'S CHIEF WITNESS CONCERNING HIS PREVIOUS JUVENILE COURT ADJUDICATIONS OF GUILT THE APPELLANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT OF CONFRONTATION OF WITNESSES AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

During the trial the court sustained the prosecutors objection to a question by the defense counsel concerning a prior juvenile court finding that the state's chief witness had been guilty of burglary (R-34).

In Davis v. Alaska 415 U. S. 308, 94 S. Ct. 1105, 39 L ED. 2d 347 (1974) the Supreme Court considered the identical question presented in the Case at bar. The Court in Davis (supra) reversed the conviction of a defendant whose defense counsel had been prevented from inquiring into a prior juvenile adjudication against the state's chief witness stating "the states policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." The court also reiterated the holding of Brookhart v. Janis 384 U. S. 1, 162 Ed 2d 314, 86 S. Ct. 1245 (1966) that denial of effective cross-examination is "Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

POINT II

DISTRUCTION BY THE POLICE OF EVIDENCE MATERIAL TO THE COMMISSION OF THE CRIME WITH WHICH A DEFENDANT IS CHARGED IS VIOLATIVE OF THE DUE PROCESS OF LAW REQUIREMENTS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In Brady v. Maryland 373 US 83, 10 L Ed 2d 215, 83 S. Ct. 1194 (1963), the Supreme Court held at 218 L Ed 2d 10 that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good fait or bad faith of the prosecutor."

In Cheatwood v. People 165 Cl 334, 435 P2d 402 (1968) the Colorado Supreme Court reversed a denial of a motion for a new trial stating at 405 P2d 435 "Evidence which might be helpful to a defendant and which is suppressed by the police or the prosecution or which is ignored by a trial court when presented to it results in a denial of due process of law . . ." emphasis added.

In Seattle v. Fettig 10 Wash. App 773, 519 P2d 1002 (1974) the defendant was tried and convicted of Driving while under the Influence. Shortly after his arrest the defendant performed physical test which were recorded on video tape. After trial and conviction in the City Court the case was appealed. Prior to the appeal trial the video tape was negligently destroyed by the police. At trial the Defendant was convicted. The Supreme Court of Washington reversed stating at 1004 P2d 519 "In the present case the video tape was negligently destroyed and thereby suppressed. Although the police destroyed the video tape, their acts are chargeable to the prosecutor; the suppression therefore was "by the prosecution." Moreover, that the suppression was negligent rather than deliverate is not material here; the defendants due process rights are affected in either case."

In Trimble v. State of New Mexico 75 N. M. 183, 402 P2d 165 (1965) an officer pursuant to a search warrant picked up 20 roles of tape recordings at the church where the defendant was the pastor. The officer listened to a part of the tapes then locked them in a file drawer. The officer admitted that the tapes would be easy to erase and there appears to be a question as to whether the defendant ever got the tapes back.

The Supreme Court of New Mexico reversed the defendants First Degree Murder Conviction stating at 166 P2d 402" and what about the tape recordings? Their availability as corroboration if present as claimed has been lost forever, and the jury was left with the statement by the police that they contained nothing concerning the case. Possibly so, But the defendant was deprived of the opportunity to use them to support his defense . . ." See also People v. Hoffman 32 Ill. 2d 96, 203 N. E. 2d 873 (1965). Trimble, supra, held further that whether the suppression was willfull or negligent was immaterial.

Appellant's position in the case at bar is sustantially stronger than either Fettig, supra or Trimble, supra, for the reaons that:

1. Subsequent to the offense and prior to trial the police deliberately destroyed the tape; and

2. Conversations between the defendant and the states chief witness occuring during the transaction for which the defendant was tried are obviously material.

The tape was physical evidence with which to either substantiate or discredit the states case. The police didn't even see fit to transcribe the conversation nor is there any evidence that they ever even listened to the recording. The first time the appellant's counsel became aware that a tape had existed was at trial (R-88). The police chose rather to be in a position to summarize, if necessary, from memory, a very small part of that conversation. In short make a self serving declaration in support of a case which they have filed and deny the fact finders the opportunity to know completely what actually transpired between the appellant and the states chief witness.

Unlike most cases where the police investigate a crime after its commission in the case at bar they planned and arranged for the commission of the offense. The police then severely hampered the defendant in his ability to prepare his defense by waiting four (4) months to arrest and charge him (T-3, 4). The degree of damage is further hightened when we consider that the defense of entrapment common to this type of offense is one in which exact conversations are very crutial. To allow the police officer to destroy physical evidence material to the offense in a case such as presented here is to condone their suppression of evidence of every conceivable nature in every type of case.

CONCLUSION

In so far as appellants counsel was not allowed proper liatitude in his cross-examination of the state chief witness and the police intentionally

destroyed physical evidence material to the offense charged the appellant's conviction must be vacated.

Respectfully submitted,

JACK W. KUNKLER